SUPREME COURT, U. S.

FILED

DEC 17 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-7571

CITIZENS TO PRESERVE OVERTON PARK, INC., ET AL.,
Petitioners,

v.

ROBERT F. SMITH, COMMISSIONER,
TENNESSEE DEPARTMENT OF TRANSPORTATION
AND
CLAUDE S. BRINEGAR, SECRETARY,
UNITED STATES DEPARTMENT OF TRANSPORTATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN W. VARDAMAN, JR.
WILLIAMS, CONNOLLY & CALIFANO
1000 Hill Building
Washington, D. C. 20006

CHARLES F. NEWMAN
BURCH, PORTER & JOHNSON
130 North Court Avenue
Memphis, Tennessee 38103

Attorneys for Petitioners

December 1974

WILSON - BYRD PRINTING CO., INC. — No. 74-7571 — WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provision Involved	3
Statement	4
1. Prior Proceedings	4
2. Proceedings Below	5
Reasons For Granting The Writ	7
Conclusion	17

TABLE OF CITATIONS

CASES: Page

Alyeska Pipeline Service Co. v. *The Wilderness Society*, 73-1977, cert. granted, 43 U.S.L.W. 3208 (Oct. 15, 1974) 16, 17
Boston Chapter, NAACP v. *Beecher*, No. 74-1067 (1st Cir. Nov. 8, 1974) 10
Brandenburger v. *Thompson*, 494 F.2d 885, (9th Cir. 1974) 9, 11
Class v. *Norton*, No. 74-1702 (2nd Cir. Oct. 10, 1974) 10
Cooper v. *Allen*, 467 F.2d 836 (5th Cir. 1972) 15
Donahue v. *Staunton*, 471 F.2d 475 (7th Cir. 1972) 15
Edelman v. *Jordan*, 39 L.Ed. 2d 662 (1974) 9, 10, 11
Fairmont Creamery Co. v. *Minnesota*, 275 U.S. 70 (1927) 8
Gates v. *Collier*, 489 F.2d 298 (5th Cir. 1973) 9, 11
Hoitt v. *Vitek*, 495 F.2d 219 (1st Cir. 1974) 10
Jenkins v. *Georgia*, 41 L.Ed. 2d 642 (1974) 8
Jordan v. *Fusari*, 496 F.2d 646 (2nd Cir. 1974) 8, 10
Jordan v. *Gilligan*, 500 F.2d 701 (6th Cir. 1974) 7, 10, 12
La Raza Unida v. *Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972) 8, 9, 15
Lee v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971) 15
Named Individual Members of the San Antonio Conservation Society, 496 F.2d 1017 (5th Cir. 1974) 10, 11
Natural Resources Defense Council v. *EPA*, 484 F.2d 1331 (1st Cir. 1973) 15
Pyramid Lake Piute Tribe v. *Morton*, No. 74-342 7
Sims v. *Amos*, 340 F. Supp. 691 (M.D. Ala. 1972), *aff'd* 409 U.S. 942 (1972) 8, 10, 15
Skehan v. *Board of Trustees of Bloomsburg State College*, 501 F.2d 31 (3rd Cir. 1974) 7, 10, 12
Spence v. *Washington*, 41 L.Ed. 2d 842 (1974) 8
Taylor v. *Perini*, No. 73-2071 (6th Cir. 1974) 10, 12
Ex Parte Young, 209 U.S. 123 (1908) 11

TABLE OF CITATIONS—Continued

STATUTES AND REGULATIONS: Page

UNITED STATES CONSTITUTION

Eleventh Amendment ..... *passim*
Fourteenth Amendment 12

28 U.S.C. § 1254(1) 2

Department of Transportation Act, 49 U.S.C. § 1653(f) 4

Federal-Aid Highway Act, 23 U.S.C. § 138 ..... 4, 5

National Environmental Policy Act, 42 U.S.C. 4331 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

CITIZENS TO PRESERVE OVERTON PARK, INC., ET AL.,
Petitioners,

v.

ROBERT F. SMITH, COMMISSIONER,
TENNESSEE DEPARTMENT OF TRANSPORTATION
AND
CLAUDE S. BRINEGAR, SECRETARY,
UNITED STATES DEPARTMENT OF TRANSPORTATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, the Citizens to Preserve Overton Park, Inc., The Sierra Club, National Audubon Society, National Wildlife Federation, William W. Deupree, Sr., and Sunshine K. Snyder pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit entered September 26, 1974, denying petitioners an

award of attorneys' fees against Robert F. Smith, Commissioner of the Tennessee Department of Transportation, and the State of Tennessee.[1]

OPINIONS BELOW

The order of the court of appeals of which review is sought is not reported. It is printed in the Appendix, *infra*, pp. 12a-13a. The opinion of the court of appeals on the merits is reported at 494 F.2d 1212 and is printed in the Appendix, *infra*, pp. 3a-11a. The opinion of the district court is reported at 357 F. Supp. 846 and is printed in the Appendix, *infra*, pp. 14a-24a.

JURISDICTION

The order of the Court of Appeals for the Sixth Circuit was entered on September 26, 1974. (App., *infra*, 1a-2a). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in a case where an award of attorneys' fees to petitioners is appropriate under the "pri-

---

[1] The caption in the court of appeals' order refers to the respondent as "Charles W. Speight, Commissioner, Tennessee Department of Highways." In fact, Speight was succeeded by Robert F. Smith and the name of the Department of Highways was changed to the Department of Transportation. The petition filed in the district court instituting the litigation resulting in the appeal below was filed on behalf of "Robert F. Smith, Commissioner of the Tennessee Department of Transportation."

vate attorney general" rationale, the Eleventh Amendment bars such an award against a state official sued in his official capacity?

2. Whether, in the context of this case, the Eleventh Amendment is applicable to petitioners' request for an award of attorneys' fees against respondent Smith for the appeal below since the aspect of this litigation which produced the appeal was initiated by the state?

3. Whether petitioners are entitled to recover attorneys' fees against the state respondent under the "private attorney general" doctrine where petitioners successfully appealed a lower court decision in order to uphold the decision of the Secretary of Transportation prohibiting the construction of an interstate highway through a large public park in Memphis, Tennessee?

CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

STATEMENT

1. Prior Proceedings

The underlying dispute in this case involves a proposal by the State of Tennessee to construct an interstate highway, I-40, through Overton Park, a large mid-city park in Memphis, Tennessee. In November 1969, the Secretary of Transportation approved construction of the highway through the park and authorized the federal government to pay 90% of its cost. Petitioners filed this action seeking injunctive relief on the ground that the Secretary had not complied with statutes designed to protect important public parks and recreation areas such as Overton Park. *See* § 4(f) of the Department of Transportation Act, 49 U.S.C. § 1653(f) and an identical provision in the Federal-Aid Highway Act, 23 U.S.C. § 138. Those statutes require that public parks such as Overton Park not be used for federal-aid highways unless there is no "prudent and feasible" alternative.

The district court granted summary judgment for the state and federal officials. 309 F. Supp. 1189 (W.D. Tenn. 1970), and the court of appeals affirmed. 432 F.2d 1307 (6th Cir. 1970). This Court reversed and remanded for a trial. 401 U.S. 402 (1971).

On remand, a plenary hearing was held in the district court. That hearing consumed 25 trial days and resulted in a transcript of over 6,500 pages with 240 exhibits. In its Memorandum Decision, the district court concluded that the Secretary's 1969 decision

approving the route through the park was illegal and, accordingly, vacated it. 335 F. Supp. 873. The court remanded the case to the Secretary for a new determination.

Following the remand from the district court, the Secretary announced that a new study of the highway would be made. Public hearings were held in Memphis and an Environmental Impact Statement was prepared pursuant to the requirements of the National Environmental Policy Act, 42 U.S.C. § 4331, *et seq.* On January 18, 1973 the Secretary announced a new decision. This time he determined that he could not, consistent with the law, approve the route through the park and he therefore rejected the state's request.[2]

2. Proceedings Below

Following the Secretary's 1973 decision rejecting the route through the park, the state respondent petitioned the district court to set aside that decision.

---

[2] The Secretarial Decision read in part:

> "On the basis of the record before me and in light of guidance provided by the Supreme Court, I find that an Interstate highway as proposed by the State through Overton Park cannot be approved. On that record I cannot find, as the Statute requires, and as interpreted by the courts, that there are no prudent and feasible alternatives to the use of parkland nor that the broader environmental protection objectives of the NEPA and the Federal-Aid Highway Act have been met, nor that the existing proposal would comply with FHWA standards on noise."

He argued that the Secretary's decision was improper because he did not specifically designate an alternative route that would avoid the park. The district court, agreeing with the state's position, determined that the Secretary's decision was illegal and vacated it. 357 F. Supp. 846. The district court opinion appears in the Appendix at pp. 14a-24a.

Petitioners and the Secretary of Transportation appealed. The court of appeals unanimously reversed. It held that the Secretary was not required to designate alternatives and that, in any event, the Secretary's explanation of his action, including the suggestion of possible alternative routes, was sufficient under the statute. The court of appeals opinion is reported at 494 F.2d 1212 and appears in the Appendix at pp. 3a-11a.

Following the decision of the court of appeals, petitioners filed a Bill of Costs in which they sought, *inter alia*, an award of attorneys' fees for attorneys' services in researching and writing the petitioners' briefs in the court of appeals, presenting oral argument and for various out-of-pocket expenses attributable to the appeal. Petitioners sought that award on the ground that they had served as "private attorneys general" in protecting the park from destruction by an interstate highway. While petitioners sought an award of fees solely for work on the appeal, they pointed out that counsel for the petitioners had spent approximately 2,700 hours on this litigation between the filing of the complaint and the notice of appeal.

Counsel's time records reflected 192 hours spent on the appeal below. In addition to the expenses for filing fees, duplication of briefs and transcripts, petitioners incurred out-of-pocket expenses in connection with the appeal totalling $1,049.[3]

The court of appeals awarded petitioners costs in the amount of $475.43 for filing fees, duplication of briefs and costs of the district court transcript. It refused to award attorneys' fees and out-of-pocket expenses on the basis of its decision in *Jordan* v. *Gilligan*, 500 F.2d 701 (6th Cir. 1974) *petition for cert. filed*, 43 U.S.L.W. 3240 (U.S. Oct. 9, 1974) (No. 74-403) which held that the Eleventh Amendment barred an award of attorneys' fees against a state official. A copy of the court of appeals' order appears in the Appendix at pp. 1a-2a.

REASONS FOR GRANTING THE WRIT

1. The question of whether the Eleventh Amendment immunizes a state or state official against an award of attorneys' fees is presented in petitions for certiorari in *Jordan* v. *Gilligan*, No. 74-403; *Taylor* v. *Perini*, No. 74-506; and *Skehan* v. *Board of Trustees of Bloomsburg State College*, No. 74-558.[4]

---

[3] Petitioners estimated that prior to the appeal they had paid out-of-pocket expenses of over $12,500 in pursuit of this litigation.

[4] The question of whether attorneys' fees can be awarded against the federal government is presented by the petition for certiorari in *Pyramid Lake Piute Tribe* v. *Morton*, No. 74-342.

As set forth more fully below, there is a clear, sharp conflict among the circuits on the issue presented by this case; the source of the conflict is a disagreement over the correct interpretation of three decisions of this Court. Thus the issue is one which must be resolved by this Court.

In *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 70 (1927) this Court held that a state's sovereignty did not immunize it from an award of costs taxed against it in this Court. In that case the Court observed that the practice of taxing costs against a state when it was the losing party was one of long standing. The Court said: "We think that the rule, construed by long practice, justifies us in treating the state just as any other litigant and in imposing costs upon it as such . . . ." 275 U.S. at 77. That practice continues. See Judgments entered in *Jenkins* v. *Georgia*, 41 L.Ed. 2d 642 (1974) and *Spence* v. *Washington*, 41 L.Ed. 2d 842 (1974) taxing costs against the states. When attorneys' fees are awarded, they are frequently taxed as costs, and thus *Fairmont Creamery* has been read [5] as supporting the position that a state's sovereignty, as reflected in the Eleventh Amendment, does not bar an award of fees against a state or state official.

More directly on point is this Court's summary affirmance in *Sims* v. *Amos*, 409 U.S. 942 (1972).

---

[5] *E.g., La Raza Unida* v. *Volpe*, 57 F.R.D. 94, 101, n.11 (N.D. Cal. 1972) *appeal pending; Jordan* v. *Fusari*, 496 F.2d 646 (2nd Cir. 1974).

That was a reapportionment case in which a three judge district court awarded attorneys' fees to the plaintiffs against the Governor, Attorney General, and Secretary of State of Alabama, as well as state legislators. 340 F. Supp. 691 (M.D. Ala. 1972). The court rejected the argument that the state officials were immunized from the award of fees. 340 F. Supp. at 694, n.8. In their Jurisdictional Statement, the state officials specifically raised the question of whether sovereign immunity barred the award. See Jurisdictional Statement, No. 72-12, October Term 1972, p. 17. This Court affirmed without opinion. 409 U.S. 942. That affirmance has been relied upon in a number of cases holding that states and state officials are not immune from an award of fees.[6]

Last term, this Court decided *Edelman* v. *Jordan*, 39 L.Ed. 2d 662 (1974). In that case the plaintiffs sought, *inter alia*, retroactive payment of welfare benefits which had been wrongfully withheld. This Court drew a distinction between prospective injunctive relief which may be granted against a state official and retroactive relief which seeks an award of an accrued monetary liability from the state. The latter, the Court held, is barred by the Eleventh Amendment. In *Edelman* the Court specifically overruled several cases in which it had summarily af-

---

[6] See *e.g.*, *Gates* v. *Collier*, 489 F.2d 298, 302 (5th Cir. 1973), *rehearing en banc granted; Brandenburger* v. *Thompson*, 494 F.2d 885, 888 (9th Cir. 1974); *La Raza Unida* v. *Volpe*, 57 F.R.D. 94, 101 n.11 (N.D. Cal. 1972) *appeal pending.*

firmed district court decisions requiring retroactive payments of benefits over an Eleventh Amendment objection. 39 L.Ed 2d at 676-77. However, the Court did not disturb its affirmance in *Sims* v. *Amos, supra.*

Nevertheless the Courts of Appeals for the Third and Sixth Circuits have expressly refused to follow *Sims* v. *Amos* on the ground that *Edelman* was intended to overrule it. See *Skehan* v. *Board of Trustees of Bloomsburg State College*, 501 F.2d 31 (3rd Cir. 1974), *Jordan* v. *Gilligan*, 500 F.2d 701 (6th Cir. 1974), and *Taylor* v. *Perini*, No. 73-2071 (6th Cir. 1974). Those courts, as well as the Fifth Circuit panel in *Named Individual Members of the San Antonio Conservation Society*, 496 F.2d 1017 (5th Cir. 1974) *rehearing en banc granted*, read *Edelman* to bar an award of attorneys' fees against a state or a state official acting in his official capacity. In *Skehan* the court interpreted *Edelman* as "closing the door on any money award from a state treasury . . ." 501 F.2d at 43, n.7.

In post-*Edelman* opinions, the First and Second Circuits have held that the Eleventh Amendment as interpreted in *Edelman* does not bar an award of fees and costs against a state official in his official capacity. See *Class* v. *Norton*, No. 74-1702 (2nd Cir. Oct. 10, 1974);[7] *Boston Chapter, NAACP* v. *Beecher*,

---

[7] See also *Jordan* v. *Fusari*, 496 F.2d 646 (2nd. Cir. 1974) (*dictum*).

No. 74-1067 (1st Cir. Nov. 8, 1974).[8] As they point out, correctly we submit, *Edelman* recognized that in exercising jurisdiction over a state official under the *Ex Parte Young*, 209 U.S. 123 (1908) doctrine, a court's order may have an "ancillary effect" on a state's treasury and such an effect is permissible. 39 L.Ed.2d at 675. Since an award of fees and costs is not in the nature of damages but is instead incidental or ancillary to the court's proper exercise of jurisdiction, it is not barred by the Eleventh Amendment.

In pre-*Edelman* decisions the Ninth Circuit as well as a panel of the Fifth Circuit held that the Eleventh Amendment was not a bar to an award of fees against a state official. See *Brandenburger* v. *Thompson*, 494 F.2d 885 (9th Cir. 1974); *Gates* v. *Collier*, 489 F.2d 298 (5th Cir. 1973). The Fifth Circuit granted rehearing *en banc* in *Gates* as well as *Named Individual Members of the San Antonio Conservation Society*. Oral argument was presented on October 2, 1974; no decision has been rendered at this time. In *Gates* the United States participated as *amicus* and argued that the Eleventh Amendment was no bar to the award of fees.

Thus, at this time the Eleventh Amendment bars an award of fees against a state or state official in

---

[8] See *Hoitt* v. *Vitek*, 495 F.2d 219 (1st Cir. 1974) in which fees were awarded against state defendants. The Eleventh Amendment issue was not discussed.

the Third and Sixth Circuits; it does not in the First, Second, and Ninth, and the issue is before the full bench of the Fifth.

The issue presented here must be resolved by this Court. As a result of the expanding number of cases in which attorneys' fees may be awarded, the question arises with great frequency. The courts of appeals are sharply divided on the issue. Since the differences arise over the correct interpretation of three of this Court's decisions, only this Court can finally resolve the issue.

If the Court grants certiorari in one or more of the three cases presently pending, *Jordan* v. *Gilligan*, No. 74-403; *Taylor* v. *Perini*, No. 74-506; *Skehan* v. *Board of Trustees of Bloomsburg State College*, No. 74-558, the petition in this case should nevertheless be granted, for this case presents an aspect of the issue not present in *Jordan*, *Taylor* or *Skehan*. Each of those cases arose under the Fourteenth Amendment or statutes enacted to enforce that Amendment. Each raises the issue whether the Fourteenth Amendment limits the sovereign immunity granted to a state by the Eleventh Amendment. The present case, however, arises under federal environmental statutes and therefore presents the question free and clear of any limitation imposed by the Fourteenth Amendment. Since the question of the application of the Eleventh Amendment to an award of attorneys' fees against state officials arises frequently in cases which do not come under the Fourteenth Amendment, it is impor-

tant that this aspect of the issue be considered by this Court.

2. There is a further reason why the Eleventh Amendment is not applicable to this case. The aspect of the litigation necessitating the appeal was not a suit "commenced or prosecuted against one of the United States" and does not come within the terms of the Eleventh Amendment. It was, instead, commenced by the state respondent.

The facts relevant to this issue are as follows. When petitioners commenced litigation in December 1969 they challenged a decision by then Secretary Volpe made in November 1969 approving the route through Overton Park. Their complaint was concerned solely with the November 1969 decision. After the decision of this Court in 1971 and the trial on remand, the district court entered an order granting the relief prayed for by petitioners, *i.e.*, it set aside the 1969 decision. The order, styled Final Judgment, was a final resolution of the issues raised by the petitioners.

In January 1973 the Secretary of Transportation made a new determination, this time refusing to approve the route through the park. At that point the state respondent commenced this round of litigation by filing a Petition to Require the Federal Defendant to Comply with Terms of Remand Order or, in the Alternative to Dissolve Injunction as to State Defendant. That Petition in effect instituted a new

and separate action, even though it was filed under the same caption and number as the case which had been brought by petitioners attacking the 1969 decision. The issues raised by the state's petition were obviously different from those initially raised by petitioners since the state challenged a different administrative determination from that originally challenged by petitioners. The only similarity between the case brought by the state and that previously brought by petitioners was that they both involved the same highway and the same park.[9]

Since the litigation producing the appeal below was commenced by the state respondent and not by pe-

---

[9] After petitioners filed their notice of appeal below, the state respondent moved to dismiss the appeal on the ground that the district court's order was not final. The court of appeals rejected that contention and in doing so specifically recognized that the litigation producing the appeal below was initiated by the state. It said:

> "Thus, under [petitioners] view, the May 1, 1973 district court order opens a whole new stage of litigation, requiring new findings, involving realigned parties (since the Secretary and Citizens to Preserve Overton Park are now in agreement), considering legal issues not raised in the initial stages of the litigation. We must concur with the latter view. [The state's] petition of February 1, 1973, which the district court effectively granted in full, began a new stage of the litigation, effectively a new and different suit. The mere fact that the case comes to us under the original title does not make the decision appealed from into a minor piece of a continuing whole." Memorandum and Order of the Court of Appeals filed September 26, 1973, p. 16.

titioners, the Eleventh Amendment was clearly inapplicable.[10]

3. In the court of appeals, petitioners sought an award of attorneys' fees against the state respondent on the theory that they had acted in the role of a "private attorney general" in pursuing this litigation to protect Overton Park. They brought the original litigation, as well as the appeal below, to vindicate not only their own rights, but the rights of the public at large and they sought to ensure the effectuation of a strong congressional policy. Thus, they argued that they came within the "private attorney general" doctrine as developed by numerous lower court decisions.[11]

The court of appeals did not reach the question of whether, assuming the Eleventh Amendment was no

---

[10] It appears that there may have been an explicit waiver of the Eleventh Amendment in this case. In the argument before this Court on December 7, 1970, counsel for the state said,

> "Basically, the position of the State of Tennessee is that we should not be stayed, not by reason of any Eleventh Amendment issue which we have not raised and do not intend to claim sovereign immunity." (Tr. 36, Proceedings of December 7, 1970.)

[11] *E.g., Natural Resources Defense Council* v. *EPA*, 484 F.2d 1331 (1st Cir. 1973); *Donahue* v. *Staunton*, 471 F.2d 475 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973); *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971); *Cooper* v. *Allen*, 467 F.2d 836 (5th Cir. 1972); *Sims* v. *Amos*, 340 F. Supp. 691 (M.D. Ala. 1972), *aff'd* 409 U.S. 942 (1972); *La Raza Unida* v. *Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972), *appeal pending*.

bar, petitioners were entitled to an award. Nevertheless, we submit that the question of whether petitioners are entitled to an award of fees under the "private attorney general" doctrine is an appropriate issue to be considered by this Court at this time.

Alyeska Pipeline Service Co. v. *The Wilderness Society*, 73-1977, *cert. granted* 43 U.S.L.W. 3208 (Oct. 15, 1974) presents the question of whether the "private attorney general" rationale may be the basis for an award of attorneys' fees absent statutory authorization. This case presents a similar issue since there is no statutory authorization for an award to petitioners. It also presents, however, an aspect of that question which is not presented by *Alyeska*. In that case respondents were awarded attorneys' fees despite the fact that they did not prevail on a number of important issues and despite the fact that Congress specifically overruled the court of appeals decision on the merits of the controversy and permitted the Trans-Alaska pipeline to go forward without further judicial review and without the necessity of complying with certain federal statutes.

In this case, petitioners not only prevailed in the court of appeals, but they have, through their litigation, (a) been successful in setting aside a decision by the Secretary of Transportation to approve the location of I-40 through Overton Park; (b) are at least partially responsible for persuading the Secretary of Transportation to deny approval of a further proposal to locate I-40 through Overton Park; and

(c) have been successful in defending that decision in the court of appeals. If, as appears likely from the grant of certiorari in *Alyeska*, the Court intends to consider the "private attorney general" rationale as a basis for awarding attorneys' fees, then we submit that it would be useful to consider the application of the doctrine in a case where, as here, petitioners have been successful in protecting an area of great public interest such as Overton Park and where, unlike *Alyeska*, the Congress has not overruled the courts on the merits of the controversy.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN W. VARDAMAN, JR.
WILLIAMS, CONNOLLY & CALIFANO
1000 Hill Building
Washington, D. C. 20006

CHARLES F. NEWMAN
BURCH, PORTER & JOHNSON
130 North Court Avenue
Memphis, Tennessee 38103

Attorneys for Petitioners

December 1974